

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 24201-3-III
)	
Respondent,)	
)	
v.)	Division Three
)	
DANNY RAY MCANULTY,)	
)	
Appellant.)	UNPUBLISHED OPINION

KULIK, J.--A jury convicted Danny R. McAnulty of residential burglary as an accomplice, second degree possession of stolen property, and possession of a controlled substance (methamphetamine). Mr. McAnulty challenges his conviction for possession of stolen property. He asserts error in the court's instruction allowing consideration of lesser included offenses. However, Mr. McAnulty suggested and approved the jury instruction he now alleges was given in error. Given the invited error, we reject his appeal and affirm the conviction.

FACTS

On January 6, 2005, Adam Darnall picked up his friend Danny Ray McAnulty and Danny's fiancée, April Pardun. After purchasing some methamphetamine, Mr. Darnall

stated that he needed to “move some of [his] girlfriend Cindy’s stuff.” Report of Proceedings at 228. Mr. Darnall, Mr. McAnulty, and Ms. Pardun then drove to the home of John Ellis.

Thirteen year old Melissa Gilliland observed Mr. Darnall’s car at Mr. Ellis’s house while she waited for the school bus. Her bus stop was located across the street from where the car was parked. Ms. Gilliland saw three people inside the car. Ms. Gilliland identified one of the occupants as Mr. McAnulty.

Mr. Ellis’s neighbor, Christina Milner, witnessed a man kicking the front door to Mr. Ellis’s house. Because Ms. Milner knew Mr. Ellis was not at home, she called another neighbor, Thomas Mort, and told him about the person breaking into the house. Mr. Mort phoned Mr. Ellis and went to the Ellis house a few minutes later.

When Mr. Mort arrived at the Ellis house, he observed two people carrying boxes from the house. Both individuals crouched behind the car to hide. Mr. Mort confronted Mr. Darnall. Mr. Darnall denied that they had kicked in the door and stated that the three were there to retrieve some of Cindy Olson’s belongings. Ms. Olson is Mr. Ellis’s former girlfriend. While Mr. Darnall was speaking with Mr. Mort, the other two individuals hid in the car and concealed their faces from Mr. Mort.

Then Mr. Ellis drove up. Mr. Darnall started to leave Mr. Ellis’s driveway, but Mr. Ellis blocked Mr. Darnall’s car. When Mr. Ellis confronted Mr. Darnall, he was told

that Mr. Darnall had a key and that he was there to retrieve some of Ms. Olson's things. Mr. Ellis then allowed Mr. Darnall, Mr. McAnulty, and Ms. Pardun to leave because he had not yet noticed any damage to his back door and because he was afraid they might be armed.

Mr. Ellis and Mr. Mort examined the Ellis house. The back door had been kicked in and the door jamb was broken in half. Numerous items were missing, including Mr. Ellis's computer, tool boxes, CDs, a DVD player, a Playstation, jewelry, and more than \$300 in cash. Mr. Ellis notified law enforcement.

Deputy Jason Mitchell heard a dispatch that described the theft and Mr. Darnall's car. Deputy Mitchell saw a car that matched the description of Mr. Darnall's car. Deputy Mitchell stopped the car and identified the occupants as Mr. Darnall, Mr. McAnulty, and Ms. Pardun. Mr. Darnall was not the registered owner of the car, so Deputy Mitchell waited for the car's owner to arrive. The owner consented to a search of the car. The stolen items from the Ellis house were located in the car. Mr. Darnall, Mr. McAnulty, and Ms. Pardun were all placed under arrest.

Mr. McAnulty was initially charged with residential burglary, first degree possession of stolen property, and possession of a controlled substance (methamphetamine). However, at trial, the judge found insufficient evidence to support the charge of first degree possession of stolen property. Specifically, the trial court found

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that the State did not prove that the value of the stolen property in Mr. McAnulty's possession exceeded \$1,500 in value as required by statute. *See* RCW 9A.56.150.

However, because Mr. Ellis testified that \$300 in cash was stolen, the trial court found there was sufficient evidence to support a finding of possession of stolen property in the second degree. *See* RCW 9A.56.160. Therefore, the court ruled that the jury could consider charges of second and third degree possession of stolen property as lesser included offenses.

Because the charge of first degree possession of stolen property could no longer be considered by the jury, Mr. McAnulty's counsel requested that the court provide the jury with an instruction indicating that the charge could no longer be considered. The parties discussed the jury instructions again at the close of Mr. McAnulty's case. Mr. McAnulty requested the trial court indicate that the evidence was insufficient as to one of the specific elements of the charge of first degree possession of stolen property. The court instructed the jury that, "the evidence introduced during the trial [was] legally insufficient to prove *one of the elements*" of the charge of first degree possession of stolen property, but that the jury would be permitted to consider lesser included offenses within that charge. Clerk's Papers at 31 (emphasis added). The court then proceeded to instruct the jury regarding the charges of second and third degree possession of stolen property.

The jury convicted Mr. McAnulty of residential burglary, possession of a

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controlled substance (methamphetamine), and second degree possession of stolen property.

ANALYSIS

Mr. McAnulty alleges error in the instruction allowing the jury to consider lesser included offenses. This court reviews alleged errors in a trial court's jury instructions de novo. *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001). Instructions are examined "against the backdrop of the jury instructions as a whole." *Id.* at 593.

Jury instructions satisfy the requirement of a fair trial if they properly inform the jury of the applicable law, are not misleading, and permit the parties to argue their theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). However, article IV, section 16 of the Washington State Constitution limits the power of judges in instructing juries to declaring the law and prohibits them from commenting on the evidence in a case. *Id.*

Here, the trial court ruled that there was insufficient evidence to support the charge of first degree possession of stolen property. The court made this ruling based on the State's failure to prove that the value of the stolen property exceeded \$1,500. The court instructed the jury that it was no longer permitted to consider the charge of first degree possession of stolen property, but that it was permitted to consider the lesser included offenses of second and third degree possession of stolen property.

However, the trial court did not limit its remarks to simply informing the jury that it could no longer consider the charge of first degree possession of stolen property. The court further elaborated that the jury could not consider the charge because there was insufficient evidence to support *one element* of the charge.

A person is guilty of second degree possession of stolen property if he or she possesses stolen property that exceeds \$250 in value but does not exceed \$1,500 in value. RCW 9A.56.160(1)(a). “Possession of property may be either actual or constructive.” *State v. Plank*, 46 Wn. App. 728, 731, 731 P.2d 1170 (1987) (quoting *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)). Actual possession occurs when the person charged with possession has physical custody of the items. *Id.* Constructive possession means that the goods are not in the actual, physical possession of the person charged, but are still within that person’s dominion and control. *Id.* This court looks to the totality of the circumstances to determine whether there was dominion and control over the items. *See State v. Paine*, 69 Wn. App. 873, 878, 850 P.2d 1369 (1993).

Only one element separates the charge of first degree possession of stolen property from the lesser included offenses of second and third degree possession of stolen property. That single element is the value of the stolen property. *See* RCW 9A.56.150-.170. Because there is only one element that differs between first degree possession of stolen property and its lesser included offenses, the court’s comments about the

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insufficiency of *one element* of the charge of first degree possession of stolen property may have created the inference for the jury that there was sufficient evidence of Mr. McAnulty's guilt of the lesser included offenses.

However, a comment on the evidence requires reversal only if the comment affected the outcome of the jury's verdict. This court presumes a prejudicial effect, but that presumption may be overcome if the State can demonstrate that overwhelming untainted evidence supports Mr. McAnulty's guilt of the charge of second degree possession of stolen property.

Here, the trial court's remark was not directed at any specific piece of evidence presented by the State. Instead, the remark went to the court's overall impression as to the merits of the State's case against Mr. McAnulty. Because the court did not direct its remarks to specific evidence, no particular piece of the State's evidence was tainted by the comment. Therefore, this court considers the entire evidence at trial when determining whether the verdict was supported by overwhelming evidence.

Here, Mr. McAnulty was at the Ellis house immediately prior to the break-in. A witness saw him carry boxes out of Mr. Ellis's house. And Mr. McAnulty tried to hide his identity upon being confronted. Moreover, Mr. McAnulty was in the car containing the stolen property when police stopped the car. Based on this evidence, the State can meet its burden of showing that the untainted evidence overwhelmingly supported the

jury's verdict.

Even assuming that the jury's verdict was affected by the court's comment, Mr. McAnulty's claims are barred if he invited the trial court's instruction of which he now complains. Under the invited error doctrine, a party cannot benefit from an error that he or she caused at trial, even if this error was not caused intentionally. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). This doctrine applies even where the asserted error is of constitutional magnitude. *Id.*

Here, Mr. McAnulty explicitly requested that the trial court provide the jury with some form of explanation regarding the removal of the charge of first degree possession of stolen property from the jury's consideration. The court then directed Mr. McAnulty's attention to the language it intended to use for that purpose, and Mr. McAnulty's counsel approved it. The trial court also asked the parties to review the language in the jury instructions at the close of Mr. McAnulty's case. Likewise, defense counsel agreed to the language when the trial court suggested the language that it subsequently used to instruct the jury.

Mr. McAnulty suggested and approved of the trial court's instruction. "“A party may not request an instruction and later complain on appeal that the requested instruction was given.”” *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (quoting *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)) (internal quotation marks

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omitted). Because this instruction was requested by Mr. McAnulty, the doctrine of invited error prevents him from complaining of the instruction in this appeal.

We affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, J.

WE CONCUR:

Schultheis, A.C.J.

Kato, J.